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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 698

H. GORDON HOWARD,
Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,
Respondent.

PETITION FOR WRIT OF CERTICRARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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7

No.

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v.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, H. Gordon Howard, respectfully prays for a Writ of Certiorari directed to the Supreme Court of the State of Colorado to review judgments of that court, suspending and disbarring the petitioner from the practice of law within the State of Colorado, which deprived the petitioner of his constitutional right of due process of law and equal protection of the laws as guaranteed him by Section 1 of the Fourteenth Amendment to the United States Constitution.

OPINIONS BELOW

The opinions of the Colorado Supreme Court are reported at 140 Colo. 151, 342 P.(2d) 635 and ___ Colo. ___, 364 P.(2d 380, and are printed in Appendices A and B to this petition.

JURISDICTION

The judgments of the Supreme Court of Colorado sought to be reviewed are the Suspension Order of August 10, 1959 (Appendix A), and the judgment disbarring petitioner on August 21, 1961 (Appendix B), each entered on the day decreed. A petition for rehearing was denied by the Supreme Court of Colorado on September 5, 1961 (Appendix C) and the time within which to petition for certiorari was extended by this Court to February 2, 1962, by order signed by Mr. Justice Whittaker on December 4, 1961.

The jurisdiction of the Supreme Court of the United States is invoked under Amendment XIV, Section 1 of the Constitution of the United States and the Act of June 25, 1948, c. 646, 62 Stat. 929, 28 U.S.C. 1257.

I. THE QUESTIONS PRESENTED FOR REVIEW

1. Whether the following procedures, individually or collectively, prevented a Disciplinary Proceeding against an attorney from being a fair hearing as guaranteed by the due process clause of the Fourteenth Amendment of the Constitution of the United States and therefore vitiated the Court's suspension from the Bar and disbarment of said attorney based thereon:

   a. Proceeding with notice to the attorney only of charges, not of misconduct, but merely of the existence of certain records and the occurrence of certain events which make it "appear" that he was guilty of misconduct;

b. Permitting the prosecutor to base his case entirely upon the Court's records of two unrelated civil actions against said attorney involving some of the same facts but different parties, different issues, a less exacting burden of proof, and different kinds of relief than those of the Disciplinary Proceeding, thereby depriving the attorney of an opportunity to confront, cross-examine, and impeach his accusers and otherwise demonstrate the unreliability of their testimony;

c. Permitting the prosecutor, in his opening statement, to read the hearing Court's opinions in said two unrelated civil cases;

d. Giving probative weight to evidence and findings of the same Court in said cases.

2. Whether the procedures recited in the question first stated, all of which were in violation of the applicable Colorado law under its Rules of Civil Procedure, case law, statutes, and or Constitution, individually or collectively denied an attorney in a Disciplinary Proceeding against him the equal protection of the laws guaranteed by the Fourteenth Amendment so that the Court's suspension from the Bar and disbarment of him based thereon were unconstitutional and invalid.

II. CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Amendment XIV:

"Section. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny any person within its jurisdiction the equal protection of the laws."

Act of May 31, 1870, c. 114, § 16, 16 Stat. 144, 42 U.S.C. 1981:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Colorado Constitution, Article II:

"Section 6. Courts of justice shall be open to every person and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay."

"Section 25. No person shall be deprived of life, liberty or property, without due process of law."

Colorado Revised Statutes, 1953, Chapter 12, Article 1:

"Section 8 . . . the justices of the supreme court in open court, at their discretion, shall have power to strike the name of any attorney or counselor at law from the roll for malconduct in his office."

"Section 9. Every attorney, before his name is stricken off the roll, shall receive a written notice from the clerk of the supreme court, stating distinctly the grounds of complaint, or the charges exhibited against him, and, after such notice, he shall be heard in his defense, and allowed reasonable time to collect and prepare testimony for his justification."

III. CONCISE STATEMENT OF THE CASE

On July 9, 1959, the People of the State of Colorado, hereinafter referred to as the respondent, through the Attorney General of that State, filed a Formal Complaint with the Supreme Court of the State of Colorado seeking disciplinary action against the petitioner herein, H. Gordon Howard, a member of the Bar of that Court since September 26, 1938. The Complaint did not charge petitioner with any misconduct or unprofessional behavior, but alleged the existence of certain records and the occurrence of certain events which make it "appear" that the petitioner was guilty of misconduct. (See Appendix D of this petition for the full Complaint.) The Complaint was accompanied by a petition to require petitioner herein to show cause why his license to practice law should not be suspended during the pendency of the Disciplinary Proceeding being instituted. Petitioner filed timely Motions to Strike and to Dismiss the Formal Complaint as insufficient.

The Citation to Show Cause was duly issued, and, on August 3, 1959, a hearing was held in the Chambers of the Supreme Court of the State of Colorado upon the question of petitioner's suspension pending the outcome of the Disciplinary Proceeding. The only evidence presented at this hearing was the testimony of the petitioner herein denying at length all charges except that he had been privately reprimanded (for an unstated reason) by that Court shortly after entering practice about twenty years prior to this hearing. (R. 460 to 500).

On August 10, 1959, the Court denied petitioner's Motions to Strike and to Dismiss and suspended his right to practice law until final disposition of the mat-

ter in full. (See Appendix A). The apparent basis therefor was probative weight given by the Court to evidence and findings in its records of the two unrelated civil actions (of which it took judicial notice) of *Howard* v. *Hester*, 139 Colo. 255, 338 P.(2d) 106 (1959) and *Howard* v. *International Trust Company*, 139 Colo. 314, 338 P.(2d) 689 (1959). The petitioner was a defendant in those two cases involving some of the same facts, but parties and issues were not the same as in the instant proceeding, a less exacting burden of proof was required and the types of relief desired were altogether different.

Among the motions made by the petitioner following this ruling was a Motion to Vacate Order of Temporary Suspension filed on August 25, 1959 which urged that petitioner's rights guaranteed by the Fourteenth Amendment to the Constitution of the United States were being violated (see R. 510 to 512), and this contention was made by the petitioner throughout the remainder of the Disciplinary Proceeding and in his Petition for Rehearing at its conclusion; said Motion and Petition were denied.

The matter was referred to the Grievance Committee of the Supreme Court of the State of Colorado which held hearings in February and March, 1960 for the purpose of receiving evidence on the issues raised by the Complaint and making findings and recommendations to the Court with regard to what disciplinary action, if any, said Court should take against the petitioner. At these hearings the Deputy Attorney General, for his opening statement, read the Formal Complaint and the Court's opinions in the two civil actions referred to above, and said at page 26 of the Record,

"Now, it was upon records in those two cases that this proceeding, this action, is based. We will shortly offer the records in evidence and rest."

Timely and proper objection was made to the reading of said opinions. (R. 4 to 26). The Deputy Attorney General did in fact offer as evidence only the testimony of the Clerk of said Court identifying said records and the records themselves. The records were admitted into evidence over objection, and the Deputy Attorney General rested his case. Petitioner's Motion to Dismiss was denied. In his defense the petitioner testified himself, produced ten witnesses whose testimony corroborated his own, and introduced into evidence a number of documents. This evidence tended to prove that the civil actions in question were groundless and that the witnesses who testified therein to the contrary were not reliable. (R. 65 to 438 and exhibits).

On April 25, 1960, the Grievance Committee, giving probative weight to the evidence and findings in the two civil cases, found the petitioner guilty of misconduct and recommended to the Court that it disbar the petitioner. Petitioner filed exceptions thereto, urging again his rights under the Fourteenth Amendment.

On August 21, 1961, the petitioner was disbarred by the Supreme Court of the State of Colorado, that Court again basing its opinion and judgment on the evidence and findings in the civil cases. (See Appendix B for opinion). Petitioner's Motion for Rehearing was denied on September 5, 1961. (See Appendix C).

IV. REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. The decisions of the Supreme Court of the State of Colorado suspending and disbarring petitioner ignored and deprived him of his rights to due process of law and equal protection of the laws as guaranteed him under Section 1 of the Fourteenth Amendment of the United States Constitution in that they were based on Disciplinary Proceedings in which the Complaint was legally defective and failed to apprise the petitioner of charges of misconduct.

2. The said decisions of the Court below ignored and denied said constitutional rights of petitioner in that at no time in the proceeding on which they were based was petitioner given the opportunity to confront, cross-examine and impeach witnesses upon whose former statements suspension and disbarment were founded.

3. The Disciplinary Proceeding against the petitioner was unfair to petitioner in that it contained a highly damaging and prejudicial error in permitting the prosecutor to make an opening statement consisting almost entirely of a reading of the same Court's opinions in two unrelated civil actions against the petitioner involving some of the same facts but different parties, different issues, a less exacting burden of proof and different kinds of relief than the instant proceeding; and the decisions of suspension and disbarment based thereon ignored and deprived the petitioner of his rights to due process of law and equal protection of the laws guaranteed to him by the Fourteenth Amendment.

4. The decisions below suspending and disbarring petitioner were based solely upon the evidence and

findings of other cases in violation of the Colorado law to which the Court had committed itself by its own rules, and accordingly the decisions deprived petitioner of his rights to due process of law and equal protection of the laws afforded by the Fourteenth Amendment.

5. The decisions of the Supreme Court of the State of Colorado suspending and disbarring petitioner violated Section 1 of the Fourteenth Amendment in that they were founded upon a judicial proceeding in which the Complaint was legally defective and failed to give notice of charges of misconduct; the evidence against petitioner was incompetent and without probative value; petitioner was denied the right to confront, cross-examine and impeach witnesses against him; and, in the case of disbarment, the prosecutor was permitted in his opening statement to read improper, incompetent and highly prejudicial material.

V. ARGUMENTS AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

A. The Formal Complaint in the Disciplinary Proceeding Against the Petitioner Failed to Give Notice to Him of Any Charges of Such a Nature as to Result in Suspension From the Bar or Disbarment Since It Contained No Allegation of Misconduct or Unprofessional Behavior by the Petitioner, and Hearings Held Pursuant Thereto and Suspension and Disbarment Based on Said Complaint Deprived the Petitioner of Property Without Due Process of Law and Denied Him Equal Protection of the Laws

In the instant case, the petitioner's right to practice law was suspended and ultimately terminated by the Supreme Court of the State of Colorado. While this right is not absolute neither is it merely a matter of grace revocable at will. The years of education undertaken in anticipation of it and the compensation it can

bring to its practitioners give to it the character of property within the meaning of the due process clause of Section 1 of the Fourteenth Amendment of the United States Constitution. *Ex parte Wall*, 107 U.S. 265; *Montgomery County Bar Ass'n.* v. *Rinalducci*, 329 Pa. 296, 197 A. 924 (1938).

Due process of law required that professional discipline of an attorney be founded on his misconduct or unprofessional behavior. *Ex parte Robinson*, 19 Wallace 505. An attorney who has done nothing objectionable is not subject to discipline. It further requires that professional discipline be preceded by notice to the attorney of the specific acts of misconduct with which he is charged. *Bradley* v. *Fisher*, 13 Wallace 335; *United States* v. *Hicks*, 37 F.(2d) 289 (9th Cir. 1930). From the above it is apparent that an attorney cannot be deprived of his license to practice law unless notified in advance thereof of charges of specific misconduct. In the instant case, no allegation of misconduct or unprofessional behavior was made at all. The charges against the petitioner were simply that certain records exist and certain events took place which make it "appear" that the petitioner was guilty of misconduct. Such charges go not to the petitioner's conduct but to his reputation, a reputation which may or may not be justified. Since notice was of charges which, if proven, would not warrant discipline (see *In re Rice*, 167 Okla. 330, 29 P.(2d) 599, 1934), suspension from the Bar and disbarment based thereon deprived the petitioner of property without due process of law.

Further, Colorado Statutes and the Rules of Civil Procedure promulgated by the Supreme Court of the State of Colorado itself require that an attorney be

charged with specific acts of "misconduct" or "malconduct" before being disciplined. Colorado Revised Statutes, 1953, 12-1-8 and 9, and Colorado Rules of Civil Procedure Chapter 20, § 247. The Court's suspension and disbarment of the petitioner without such charges in violation of the laws of the State and the Court's own rules not only contravened Article II, Colorado §§ 6 and 25 of the Colorado Constitution guaranteeing its citizens "equality of justice" and "due process of law" but offended Section 1 of the Fourteenth Amendment of the Constitution of the United States and the Act of May 31, 1870, c. 114, § 16, 16 Stat. 144, 42 U.S.C. 1981 guaranteeing equal protection of the laws.

B. At No Time in the Course of the Disciplinary Proceeding Were the Persons Upon Whose Testimony Suspension and Disbarment Were Based Brought Before the Petitioner So That He Could Confront, Cross-Examine and Impeach Them and Otherwise Demonstrate the Unreliability of Their Testimony, and Suspension and Disbarment Based on Such a Proceeding Deprived Petitioner of Property Without Due Process of Law and Denied Him Equal Protection of the Laws

"A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." *In re Oliver*, 333 U.S. 257, 273.

"In other words, he must in advance be informed of the purpose of the proceeding and of the grounds therefor, and be afforded a fair opportunity to interrogate the witnesses testifying against him and to produce evidence in refutation or rebuttal. These are indispensable requirements. . . ." *United States* v. *Hicks*, supra.

"Due process of law in such cases requires specific charges, due notice of the same, an opportunity to make specific answers to them, an opportunity to cross-examine the witnesses in support of them, an opportunity to adduce testimony in contradiction of them, and an opportunity for argument upon the law and facts." *Garfield* v. *United States ex rel Spalding*, 32 App. D.C. 153, 158 (1908); certiorari denied 212 U.S. 584.

The Court's refusal to grant the petitioner this most fundamental right in accordance with the laws and Constitution of the State of Colorado denied to petitioner equal protection of the laws.

C. The Deputy Attorney General Was Permitted, Over Objection, to Make an Opening Statement Consisting Almost Entirely of a Reading of Court Opinions in Two Unrelated Civil Actions Involving Some of the Same Facts But Different Parties, Different Issues, a Less Exacting Burden of Proof and Different Kinds of Relief Than the Instant Proceeding, With a severely Prejudicial Effect on the Petioner's Cause, and Disbarment Based on Such Proceeding Deprived the Petitioner of Property Without Due Process of Law and Denied Him Equal Protection of the Laws

Section 251 of the Rules of Civil Procedure of the Supreme Court of the State of Colorado provides that, with certain exceptions not material to this case, "hearings on formal complaints shall be conducted in conformity with the practice in the trial of civil actions." The law in Colorado is clear that opening statements must be confined to matters properly subject to proof and consideration by the Court. *Carr* v. *Boyd*, 123 Colo. 350, 229 P.(2d) 659 (1951); *Mulligan* v. *Smith*, 32 Colo. 404, 76 P. 1063 (1904); *Burke* v. *South Boulder Canon Ditch Co.*, 76 Colo. 354, 231 P. 674 (1925). And while there are

no Colorado cases on the point, both reason and precedent elsewhere (*Gulf, Mobile & Northern R. Co.* v. *Weldy*, 195 Miss. 345, 14 So. (2d) 340 (1943); *Fox* v. *Schaeffer*, 131 Conn. 439, 41 A. 2d 46, 157 A. L. R. 132, (1944); *Jones* v. *Teal*, 57 S. W. (2d) 617 (C.C.A. Tex. 1933), affirmed 126 Tex. 480, 89 S. W. (2d) 987) prohibit consideration in one trial of conclusions reached in another even though the other trial involved the same facts or was held in the same court by the same judge. Hence, it is improper to read judicial opinions in an opening statement since they could not be received or considered as probative evidence of the conclusions they state.

In the instant case the impropriety is rendered much more grave by the fact that the opinions were of the Court to which the Grievance Committee was to report and were written by the Chief Justice of that Court who found in those civil actions that petitioner had committed acts which, if proven in a Disciplinary Proceeding, would warrant firm disciplinary action. The opinions, as read in the opening statement, were virtually a mandate to the Grievance Committee by the Chief Justice of the Court, it served to find against the petitioner.

Clearly, the procedure offends the "due process" clause, and, inasmuch as the Court, through its Committee, refused to comply with its own rules and the case law and Constitution of the State of Colorado, it also offends the "equal protection" clause.

D. In Suspending From the Bar and in Disbarring the Petitioner By Giving Probative Weight to Evidence and Findings of Misconduct Appearing in Unrelated Civil Actions Involving Some of the Same Facts But Different Parties, Different Issues, a Less Exacting Burden of Proof, and Different Kinds of Relief Than the Instant Proceeding, the Supreme Court of the State of Colorado Deprived the Petitioner of Property Without Due Process of Law and Denied Him Equal Protection of the Laws

While a court can take judicial notice of the existence of its records, this notice does not extend to the facts and conclusions therefrom upon which its judicial actions were based. It can take notice that it has declared a deed void or that the contest before it has already been decided by it in another proceeding and is *res judicata*, but it has no authority to take the proof from one case and give it probative value in another. *Becker Steel Co. of America* v. *Cummings*, 16 F. Supp. 601 (S.D. N.Y. 1936); *Interstate Co.* v. *Jolly*, 156 Miss. 199, 125 So. 406 (1930), suggestion of error overruled 156 Miss. 199, 125 So. 838; *Illinois Cent. R. Co.* v. *Walker*, 116 Miss. 431, 77 So. 191 (1918); *Armstrong* v. *Jones*, 198 Miss. 627, 22 So. (2d) 7 (1945); *Scott* v. *Clark*, 38 S.W. (2d) 382 (C.C.A. Tex. 1931); *Grayson* v. *Rodermund*, 135 S.W. (2d) 178 (C.C.A. Tex. 1939). See also *Fox* v. *Schaeffer*, supra.

The only other reasonable theory upon which probative weight could be given to any part of the records of the two civil cases is that the testimony therein is admissible as testimony given at a former trial. But this is not the Colorado law. The Supreme Court of the State of Colorado, in the case of *Rio Grande Southern R. Co.* v. *Campbell*, 55 Colo. 493, 136 P. 68 (1913), said at page 68, "In 2 Wigmore on Evidence, Section 1415, it is said: 'No one has ever doubted that the former testimony of a witness cannot be used if the

witness is still available for the purpose of testifying at the present trial.' What Weller said on the first trial was hearsay on the second trial, and could not be introduced as substantive evidence by the party calling him, unless it came within some well established exception to the rule regarding hearsay evidence. Merely because it was given at a former trial of the same case involving the same issues and between the same parties, where the witness was cross-examined, did not make it admissible as his evidence on this trial. Instead of plaintiff making his case by evidence given on this trial, he was permitted to do so by evidence given at another trial." The Colorado rule prohibits admission of former testimony unless a showing is made that the witness could not testify in the present proceeding either in open court or on deposition. *Bolles v. O'Brien*, 59 Colo. 261, 151 P. 450 (1915); *Daniels v. Stock*, 23 Colo. App. 529, 130 P. 1031 (1913); *Magnes v. Sioux City Nursery and Seed Co.*, 14 Colo. App. 219, 59 P. 879 (1900). Such a showing was not even attempted.

The findings in the instant Disciplinary Proceeding were based solely upon the evidence and findings of other cases in violation of the Colorado law to which the Court had committed itself by its rules and in violation of its rule contained in Chapter 20, § 254 of its Rules of Civil Procedure requiring that "the charges be established by substantial, clear, convincing and satisfactory evidence." Loss of the right to practice law based the evidence and findings in other unrelated civil actions denied the petitioner due process of law and the equal protection of the laws.

E. The Above Procedures Collectively Prevented the Disciplinary Proceeding From Being a Fair Hearing, and Suspension and Disbarment Based Thereon Deprived the Petitioner of Property Without Due Process of Law and Denied Him Equal Protection of the Laws

Basing suspension from the Bar and disbarment upon an insufficient Complaint, an improper opening statement, and records not having probative evidentiary value with the result that the petitioner was denied the opportunity to interrogate his accusers in this Disciplinary Proceeding cumulatively had the effect of rendering the proceeding unfair and in violation of due process, and the Court's systematic refusal to obey its own rules or the laws or Constitution of the State of Colorado was not equal protection of the laws.

VI. CONCLUSION

Certainly, it is a fundamental principle of justice that in holding a judicial hearing upon which a member of the Bar may be deprived of his license to pursue his profession, a court must follow a procedure which affords the attorney a fair opportunity to refute the charges made against him, and denial to the petitioner by the Court below of such opportunity by systematically violating its own rules and the case law, Statutes and Constitution of the State of Colorado rendered its suspension and disbarment of the petitioner offensive to the due process of law and the equal protection of the laws provisions of Section 1 of the Fourteenth Amendment of the United States Constitution.

Accordingly, petitioner prays this Honorable Court grant a writ of certiorari to the Supreme Court of the State of Colorado.

Respectfully submitted,

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JOHN B. BROMELL
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APPENDIX A

FILED IN THE SUPREME COURT OF THE STATE OF COLORADO

August 10, 1959

George W. Trout, Clerk

No. 19131

THE PEOPLE OF THE STATE OF COLORADO,
Relator,

v.

H. GORDON HOWARD, *Respondent.*

Original Proceeding

En Banc

Respondent's License to Practice Law Suspended

Mr. Duke W. Dunbar, Attorney General,

Mr. Frank E. Hickey, Deputy Attorney General,
Attorneys for Relator.

Messrs. Rogers, McClain and Brown,
Attorneys for Respondent.

Mr. Justice Hall delivered the opinion of the Court.

This is an original proceeding initiated by the Attorney General of the state of Colorado who, on July 9, 1959, filed with the clerk of this court a petition for a citation directed to H. Gordon Howard, an attorney licensed by this court to practice law in the state of Colorado, to show cause why his license should not be suspended during the pendency of disciplinary proceedings pending before the Grievance Committee of this court, and awaiting investigation hearing and recommendations of that committee with respect to the charges filed against said Respondent.

Pursuant to said petition, citation was issued on July 13, 1959, directing the Respondent to appear before this

court at 9:30 A. M., July 27, 1959, to show cause why his license should not be suspended. The citation, together with a copy of the complaint, pending before the said Grievance Committee, was served on the Respondent on July 14, 1959. Thereafter and on July 21, 1959, Respondent filed a motion for a continuance and extension of time for appearance herein, and was granted further time and until August 3, 1959, to make his appearance and return.

On July 30, 1959, the Respondent, through his counsel, filed a motion for further continuance and for additional time to make return to said citation, which motion was on July 30, 1959, denied.

On July 31, 1959, the Respondent, through his counsel, filed his motion to dismiss the formal complaint then pending before the Grievance Committee, and thereafter and on August 3, 1959, prior to the hour of hearing herein filed a motion to strike certain allegations from the complaint pending against him.

At 9:30 A. M., August 3, 1959, the Respondent and his counsel appeared before this court and his counsel again urged and requested that a continuance be granted, which request for a further continuance was denied. Counsel was given an opportunity to argue the merits of his motions to dismiss and to strike and ruling thereon was deferred.

The Respondent, of his own volition and without being required so to do, was sworn as a witness and given full opportunity to answer any matters set forth in the charges filed against him. He testified with reference to each of the four charges and was given full opportunity to present any evidence that he might offer in his defense. At the close of the hearing the court took the matter under advisement.

The court now being fully advised in the premises denies the motion to strike and the motion to dismiss and, hav-

ing reviewed the charges, considered the testimony of Respondent, and taken judicial notice of its own records; particularly the records in Case No. 18456, *H. Gordon Howard, et al.*, v. *Joseph D. Hester, as Conservator, et al.*, a civil proceeding (brought to this court by Respondent by writ of error), decided April 13, 1959, wherein it was found and determined that respondent had obtained from Mary E. Hainmin, age eighty-five years, by fraud and undue influence, the sum of $1000.00 and her promissory note for $250.00; and Case No. 18346, *Howard* v. *International Trust Company, et al.*, a civil proceeding (brought to this court by Respondent by writ of error), decided April 27, 1959, wherein it was found and determined that Respondent by fraud obtained from Mary Steinhart, age eighty-eight years, a deed to certain real estate located in Illinois, now Texas that the records in the cases above referred to disclose facts which warrant and sanction the suspension of the Respondent's license to practice law pending final hearing and determination of the charges set forth in the complaint.

It is therefore ordered that the Respondent's license to practice as an attorney and counsellor at law in the state of Colorado is hereby suspended until the further order of this court; it is further ordered that the Respondent forthwith and from this date hence cease and desist from holding himself out as an attorney authorized to practice law in the state of Colorado, and that he cease and desist from the practice of law in any manner, directly or indirectly.

Mr. Justice Frantz not participating.

APPENDIX B

FILED IN THE SUPREME COURT OF THE STATE OF COLORADO

August 21, 1961

George W. Trout, Clerk

No. 19131

THE PEOPLE OF THE STATE OF COLORADO,

v.

H. GORDON HOWARD,

Attorney Respondent.

Original Proceeding in Discipline

En Banc

Respondent Disbarred

Mr. Duke W. Dunbar, Attorney General,

Mr. Frank E. Hickey, Deputy Attorney General,

Mr. Richard A. Zarlango, Assistant Attorney General,

Attorneys for the People of the State of Colorado.

Respondent H. Gordon Howard, pro se.

Mr. Justice Sutton delivered the opinion of the Court.

Respondent H. Gordon Howard was licensed to practice law in Colorado on September 26, 1938. On July 9, 1959, the Attorney General filed a formal complaint against Howard alleging facts which if proved would justify his disbarment. On August 3, 1959, a hearing was held before this court on a citation directed to respondent to show cause why his license to practice law should not be suspended pending determination of the complaint. As a result of that hearing he was suspended from the practice of law until further order of the Court. In *Re Howard*, 140 Colo. 151, 342 P.(2d) 635. The suspension has not been lifted and the matter is now before the court for final determination upon the report and recommendation for disbarment of the Grievance Committee of the Court.

Two charges, of the original four filed, were considered by the Committee and now by the Court as a basis for this disciplinary proceeding. They are:

1. The alleged obtaing of a warranty deed to real estate in La Salle County, Illinois, from one Mary Steinhart, a then aged, partially blind woman, by means of fraud and deceit without consideration. We note that Mrs. Steinhart was deceased by the time the complaint was filed; and

2. The alleged obtaining of $1,000.00 in cash and a $250.00 a cognovit note payable to respondent's wife from Mary E. Hannum, an aged woman, by imposition, fraud and deceit and without compensation. We note that Mrs. Hannum was adjudicated mentally incompetent about the time the complaint was filed against respondent.

Suffice it to say here that the charges in question were sufficiently established, over respondent's denials, his own testimony and that of his witnesses as well as by the records in two civil actions against respondent in this Court, *Howard* v. *International Trust Company*, 139 Colo. 314, 338 P.(2d) 689, and *Howard* v. *Hester*, 139 Colo. 255, 338 P. (2d) 106.

Respondent particularly objects to the consideration of the records in the civil cases referred to, contending for application of the general rule that such records are not admissible because of lack of privity of the parties. He ignores the exception to this rule which is to the contrary in the case of disciplinary proceedings against an attorney. *See Werner* v. *State Bar*, 24 Calif. (2d) 611, 150 P.(2d) 892; *Louisiana State Bar Association* v. *Sachett*, 231 La. 655, 92 So. (2d) 571; *Armitage* v. *Bar Rules Committee*, 223 Ark. 465, 266 S.W. (2d) 818; *Re Thatcher* v. *United States* (C.C.A. 6th Circuit 1914) 212 Fed. 801.

Put another way, in objecting to the admission in evidence of these records, respondent fails to recognize the distinction between disciplinary and usual civil or crimi-

nal proceedings. In *In Re Lacy*, 239 Mo. App. 71, 112 S.W. (2d) 594, the Missouri court drew this distinction saying:

> "In his brief and argument, the respondent has proceeded on the theory that this is an adversary proceeding. We do not so understand it. It is an investigation by the court into the conduct of one of its officers and is neither a civil action nor a criminal proceeding, but a proceeding sui generis, the object of which is not to punish the offender, but to protect the court."

Rule 254, R.C.P. Colo. provides:

> "To warrant a finding of misconduct, the charges must be established by substantial, clear, convincing and satisfactory evidence."

However, this does not mean that strict rules of evidence apply in disbarment proceedings, although they are frequently invoked to insure a fair hearing (*Werner supra*).

In *State* v. *Gudmundsen*, 145 Neb. 324, 16 N.W. (2d) 474, the court said:

> "It is therefore the holding of this court that the finding in a civil action that an attorney at law has been guilty of conduct justifying disbarment is not conclusive on the same question when presented for determination in an action for disbarment; that notwithstanding the finding in the civil action the culpability of the attorney must be established in the disbarment action by a clear preponderance of the evidence. For this purpose the evidence taken at the trial of the civil action and all other competent evidence is admissible."

In the present case the records and transcripts in the civil actions referred to were taken by the Committee as establishing prima facie grounds for disbarment of respondent, and he was given every opportunity to present any competent evidence he had to rebut, overcome or impeach the contents of those records.

Respondent availed himself of this right consuming over two days in the presentation of his defense. And, he was also personally present at the trial of both civil actions and had full opportunity to cross-examine and did cross-examine all witnesses either personally or through counsel.

In Re Durant, supra, at page 500 of the Atlantic report the court said:

> "An attorney at law is an officer of court, exercising a privilege or franchise to the enjoyment of which he has been admitted not as a matter of right, but upon proof of fitness, brought evidence of his possession of satisfactory legal attainments and fair private character. * * * For the manner in which this privilege of franchise is exercised he is continually accountable to the court; and it may at any time be declared forfeited for such misconduct, whether professional or non professional, as shows him to be an unfit or unsafe person to manage the business of others in the capacity of an attorney. * * * The power to declare this forfeiture is a summary one inherent in the courts, and exists, not to mete out punishment to an offender, but that the administration of justice may be safeguarded and the courts and the public protected from the misconduct or unfitness of those who are licensed to perform the important functions of the legal profession."

The findings and conclusions of the Grievance Committee were that the respondent had used his position as attorney to defraud Mary E. Hannum and had used his position as agent to defraud Mary Steinhart and that his misconduct had been clearly established by the records in the civil actions referred to; that the acts committed by the respondent were and are contrary to acceptable standards of honesty, integrity and morality; and demonstrated his unfitness to continue in the practice of law. In consequence the Committee recommended that respondent be disbarred.

An examination of the record and briefs in this action confirms the correctness of our prior action in suspending respondent and leads to the inevitable conclusion that he should be disbarred.

The respondent is disbarred and his name ordered stricken from the roll of attorneys of this Court.

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF COLORADO

No. 19131

H. GORDON HOWARD, *Respondent, Appellant,*

v.

THE PEOPLE OF THE STATE OF COLORADO, *Relator, Appellee*

Original Proceeding in Discipline

The Court having considered the motion of respondent for rehearing in said cause, and being sufficiently advised in the premises, it is this day ordered that said motion be, and the same hereby is, denied.

By the Court. En Banc. September 5, 1961.

APPENDIX D

Filed July 9, 1959
George W. Trout, Clerk

Formal Complaint of the Attorney General of the State of Colorado Against H. Gordon Howard

To the Grievance Committee of the
Supreme Court of the State of
Colorado

It is alleged by the complaint in his official capacity as Attorney General of the State of Colorado as follows:

1. That H. Gordon Howard under the name of Herman Gordon Howard heretofore and on or about the 26th day

of September, 1938 took the oath as prescribed by law, subscribed the rolls of the Supreme Court and was duly admitted and licensed by the Supreme Court of the State of Colorado to practice law within said State of Colorado.

2. That during the last twenty years several complaints have been made to the GrieVance Committee of the Denver Bar Association and the Colorado Bar Association relative to the conduct of H. Gordon Howard, and on one occasion he was privately reprimanded by the Supreme Court.

3. That it appears from the record in case No. 18456 in the Supreme Court of Colorado, entitled H. Gordon Howard, et al., Plaintiffs in Error, v. Joseph D. Hester, as Conservator of the Estate of Mary E. Hannum, also known as May Hannum and Mae Hannum, a Mental Incompetent, Defendant in Error, that said Howard while acting as agent for and later as attorney for one Mary E. Hannum, an aged woman and mental incompetent, between on or about February 11, 1957 and on or about March 11, 1957, by imposition, fraud and deceit obtained from said Mary E. Hannum the sum of $1,000.00 in cash and a cognovit note payable to said Howard's wife in the sum of $250.00, without any consideration whatsoever and to which said Howard or his wife were not entitled.

4. That it appears from the record in Case No. 18340 in the Supreme Court of Colorado, entitled H. Gordon Howard, Plaintiff in Error, vs. The International Trust Co., Special Administrator of the Estate of Mary Steinhart, deceased, Defendant in Error, that said Howard, while acting as agent for Mary Steinhart, a partially blind woman of the age of 88 years, some time during the months of April and May, 1956, by fraud and deceit induced said Mary Steinhart to execute a Warranty Deed by means of which real estate in the County of La Salle, Illinois, was purportedly conveyed by her to said Howard and to execute a receipt for the sum of $6,000.00 in payment for said

real estate, when in truth and in fact said Mary Steinhart had no intention of conveying said real estate to said Howard and did not receive said $6,000.00 or any consideration therefor.

5. That it appears from the record in Civil Action No. S-4345 in the Superior Court in and for the City and County of Denver, Colorado, entitled Mary Anna Brockelman, Plaintiff, vs. H. Gordon Howard, Defendant, that said Howard as a witness in said case in his own behalf gave testimony which was false and untrue for the purpose of deceiving and misleading the Court and jury.

6. That on or about June 13, 1955 one Peter Razatos, of 809 East Colfax Avenue, Denver, Colorado, made complaint to the Denver Bar Association that said Howard, acting as attorney for Mrs. Clara Ragland, brought suit in her behalf against said Peter Razatos and others for fraud and deceit in the complaint in which said Howard made allegations which the said Howard then and there knew to be false and untrue.

Wherefore, it is respectfully requested that the Committee proceed in accordance with the rules of the Supreme Court of the State of Colorado in such cases made and provided.

DUKE W. DUNBAR
Duke W. Dunbar,
Attorney General of the State of Colorado

July 8, 1959.

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FILED
MAR 5 1962
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 606

H. GORDON HOWARD, Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,
Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

DUKE W. DUNBAR,
Attorney General of the
State of Colorado
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Denver 2, Colorado
Attorney for Respondent.

Of Counsel:
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MARCH, 1962.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 698

H. GORDON HOWARD, Petitioner

v.

THE PEOPLE OF THE STATE OF COLORADO
Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

We do not think that the questions presented by this case are those stated in the petition. In our opinion there is only one

QUESTION PRESENTED

Whether the procedures followed by the Supreme Court of Colorado in the suspension from the bar and the disbarment of petitioner deprived the petitioner of rights granted by the Fourteenth Amendment of the Constitution of the United States.

CONCISE STATEMENT OF THE CASE

Petitioner, H. Gordon Howard, was an attorney at law licensed to practice law in the State of Colorado.

Because of certain dealings with one Mary E. Hall, the petitioner was involved in a lawsuit in which a judgment was rendered against him in the trial court. Petitioner brought this case to the Supreme Court of the State of Colorado for review where the judgment was affirmed *Howard v. Hall*, [redacted].

Because of certain dealings with one Mary Stanley, petitioner was involved in a lawsuit in which a judgment was rendered against him in the trial court. Petitioner brought this case to the Supreme Court of the State of Colorado for review where the judgment was affirmed *Howard v. Fitzgerald and Stanley*, [redacted].

The show cause order issued by the Supreme Court of Colorado on August 10, 1959 was based on the records in these two cases and on a hearing held on August 4, 1959 in which petitioner was afforded an opportunity to be heard and was heard at length. *People of the State of Colorado v. H. Gordon Howard*, [redacted].

At a subsequent hearing held before the Grievance Committee of the Supreme Court, the records of these two cases were considered by the Committee and the petitioner was given opportunity to rebut, overcome and explain these records and consumed over two days in the presentation of his defense. The Committee recommended that

the petitioner be disbarred. This recommendation was followed by the Supreme Court of the State of Colorado and the petitioner was disbarred on August 21, 1961. *People of the State of Colorado v. Howard*, Colo. , 363 P.(2d) 380.

REASONS FOR DENYING WRIT

1. The disbarment of an attorney is a matter within the exclusive jurisdiction of the State Court and is not reviewable by this Court unless there has been a clear violation of the United States Constitution.

2. The complaint filed against petitioner was legally correct and fully apprised the petitioner of the charge of misconduct being brought against him.

3. Petitioner was a party to both civil actions and was present in person at the trial of both cases. At both trials petitioner or his counsel had full opportunity to cross-examine all witnesses and in fact did cross-examine the witnesses and presented testimony on petitioner's behalf. The issues in the two civil cases were exactly the same as those in the disbarment proceeding, to wit: Did petitioner while acting as agent for and later as attorney for one Mary E. Hammon, an aged woman and mental incompetent, between on or about February 11, 1957 and on or about March 11, 1957, by imposition, fraud and deceit obtain from said Mary E. Hammon the sum of $1,000 in cash and an original note payable to petitioner's wife in the sum of $20,000, without any consideration therefor and to which petitioner or his wife were not entitled, and did petitioner, while acting as agent for Mary Stoddart, a partially blind woman of the age of 88 years, from during the month of April and May, 1956, fraudulently and deceitfully induce said Mary Stoddart to execute

a Warranty Deed by means of which real estate in the County of La Salle, Illinois, was purportedly conveyed by her to said petitioner and to execute a receipt for the sum of $6,000.00 in payment for said real estate, when in truth and in fact said Mary Steinhart had no intention of conveying said real estate to said petitioner and did not receive said $6,000.00 or any consideration therefor. At the suspension hearing, petitioner was given the opportunity to present any defense he might have to the charges. Petitioner was again afforded this opportunity in the hearing before the Grievance Committee at which hearing he in fact did present his defense consuming over two days in its presentation.

4 The reading of the opinions of the Supreme Court of Colorado in the two civil cases in which petitioner was a party was not a violation of any of his rights guaranteed by the Fourteenth Amendment of the United States Constitution. The facts and issues were the same in the disciplinary proceeding as they were in the civil cases. The cases were related in that the petitioner was a defendant or a respondent in each action and in each action his conduct was the sole issue. The burden of proof in Colorado in a civil action is a preponderance of the evidence. No authority is cited by the petitioner for the proposition that a more exacting burden of proof is required in a disbarment proceeding. Even if a more exacting burden is required, whether this burden was met by the transcript of the testimony in these cases was a matter for the determination of the Supreme Court of Colorado alone.

5 The question of the admissibility of the records of civil actions in a disbarment proceeding has never be-

fore been decided by the Colorado Supreme Court. Other courts in other states have determined that such records are admissible in disbarment proceedings even though not ordinarily admissible in civil or criminal actions. The Colorado Court in deciding that such records are admissible in this kind of proceeding followed these decisions. Since this question has never before been decided by the Colorado Court the petitioner is in error in his argument that the Court has violated its own rules and decisions.

6. Petitioner had equal protection of the laws and was not denied due process of law. Petitioner did in fact confront and cross-examine the witnesses against him in the civil actions mentioned and in the disciplinary proceeding he was afforded an opportunity to be heard and was given ample and proper notice of the charges brought against him. The only questions presented are questions of evidence which are within the province of the state court to decide. The Colorado Court has decided, as have other states, that the records of other actions are admissible in disbarment proceedings.

SUMMARY OF THE ARGUMENT

I. This Court should not assume jurisdiction in this case.

II. The formal complaint was legally adequate and gave petitioner notice of the charges against him.

III. The reading of the opinions in the two civil actions and the admission into evidence of the transcripts of the testimony and the records in those cases were not in violation of the United States Constitution or the Constitution of the State of Colorado.

ARGUMENT

I

THIS COURT SHOULD NOT ASSUME JURISDICTION IN THIS CASE

This Court does not have power or authority to re-examine or reverse as a reviewing court the action of the Supreme Court of a state in suspending or otherwise disciplining a member of the bar of the courts of that state for personal and professional misconduct. *Selling v. Radford*, 243 U. S. 46. It is not for this Court, except within narrow limits, to sit in judgment on state disbarments. *Theard v. United States*, 354 U. S. 278.

This is not a case which falls within the narrow limits in which this Court will sit in judgment on a state disbarment such as existed in *Schware v. Board of Bar Examiners of the State of New Mexico*, 353 U. S. 232, and in *Konigsberg v. State Bar of California*, 353 U. S. 252. In both of those cases the petitioners were denied admittance to the bar because of previous affiliation with the Communist party which party was a legal political party at the time of the affiliations in question and such denial of admittance was arbitrary and unreasonable.

In deciding *Schware v. Board of Bar Examiners of the State of New Mexico*, supra, at page 248 Mr. Justice Frankfurter in a separate opinion said:

> "It is beyond this Court's function to act as overseer of a particular result of the procedure established by a particular state for admission to its bar. No double satisfaction of the requirement of moral

character involves an exercise of delicate judgment on the part of those who reach a conclusion . . . especially in this realm it is not our business to substitute our judgment for the state's judgment—for it is the state in all the panoply of its powers that is under review when the action of its Supreme Court is under review."

" . . . to a wide and deep extent, the law depends upon the disciplined standards of the profession and belief in the integrity of the courts. We cannot fail to accord such confidence to the state process, and we must attribute to its courts the exercise of a fair and not a biased judgment in passing upon the applications of those seeking entry into the profession."

We respectfully submit that these words of Mr. Justice Frankfurter apply with equal force to the disbarment of an attorney and that this Court should entertain jurisdiction over this case only if it finds that the requirements of due process have been clearly violated by the State Court's action in its finding, from the evidence it had before it, that the petitioner committed acts which were and are contrary to acceptable standards of honesty, integrity and morality, which demonstrated his unfitness to continue in the practice of law.

THE FORMAL COMPLAINT WAS LEGALLY ADEQUATE AND GAVE PETITIONER NOTICE OF THE CHARGES AGAINST HIM.

In the case of *Ex Parte Wall*, 107 U. S. 265, this Court was called upon to rule on the adequacy of an order directed to an attorney advising him that it had come to the "knowledge" of the court that the attorney had engaged in a lynching and directing him to appear on a date certain to show cause why he should not be disbarred. This Court held the order adequate and affirmed the disbarment quoting with approval from *Ex Parte Steinman*, 95 Pa. 220, as follows:

> "We entertain no doubt that a court has jurisdiction without any formal complaint or petition, upon its own motion, to strike the name of an attorney from the roll in a proper case, provided he has had reasonable notice and been afforded an opportunity to be heard in his defense."

In the same case this Court also quoted with approval from *Randall v. Brigham*, 7 Wall. 539, as follows:

> "But the claim of the plaintiff is not correct. The information imparted by the letter was sufficient to put in motion the authority of the court; and the notice to the plaintiff was sufficient to bring him before it to explain the transaction to which the letter referred. The informality of the notice, or of the complaint by letter, did not touch the question of jurisdiction. The plaintiff understood from them the nature of the charges against him; and it is not pretended

that the investigation which followed was not conducted with entire fairness. He was afforded ample opportunity to explain the transaction and vindicate his conduct."

We respectfully submit that the formal complaint filed in this case is in compliance with the above requirements because it gave petitioner reasonable notice and he understood from it the nature of the charges against him. Since his defense consumed in excess of two days, it cannot be successfully contended that petitioner was not afforded an opportunity to be heard in his defense.

III.

THE READING OF THE OPINIONS IN THE TWO CIVIL ACTIONS AND THE ADMISSION INTO EVIDENCE OF THE TRANSCRIPTS OF THE TESTIMONY AND THE RECORDS IN THOSE CASES WERE NOT IN VIOLATION OF THE UNITED STATES CONSTITUTION OR THE CONSTITUTION OF THE STATE OF COLORADO.

The due process clause of the Fourteenth Amendment of the Constitution of the United States guarantees notice and an opportunity to be heard. The equal protection of the laws clause guarantees that all persons shall be treated equally. The petitioner was given proper and ample notice of the proceedings and availed himself of the opportunity to be heard. Therefore, he was not denied due process of law. The procedures questioned are strictly matters of evidence which are within the province of the State

Court. The State Court in this case has followed precedent set in other jurisdictions and has determined that records in civil actions to which an attorney is a party are admissible in disbarment proceedings brought against him. Petitioner has not shown that in other disbarment proceedings brought against other attorneys in Colorado this type of evidence was excluded and that he has, therefore, been treated differently from other attorneys and thus deprived of equal protection of the laws. On the contrary the great weight of authority seems to uphold the proposition that such records are admissible in disbarment proceedings.

We concede that the general rule in civil cases is to the effect that the record of testimony in one case is not admissible in another unless the actions are between the same parties or their privies and then only when the witness is deceased or unavailable. However, there is a well recognized exception in the case of a disciplinary proceeding against an attorney.

It was held in the following cases that the record of the testimony in another case respecting the conduct of an attorney was admissible in a disciplinary proceeding against him:

Hallinan v. State Bar, 24 Calif. (2d) 611, 150 P (2d) 892.

Louisiana State Bar Association v. Seabell, 231 La. 655, 92 So (2d) 571.

Armitage v. Bar Rules Committee, 223 Ark. 465, 266 SW (2d) 818.

State v. Gudmundson, 145 Neb. 324, 16 NW (2d) 474.

In Re Lacy, 239 Mo. App. 71, 112 SW (2d) 504.

In Re Wilson, 76 Ariz. 49, 258 P (2d) 433.

In Re Dupont, 80 Conn. 140, 67 A. 497.

In Re Keenan, 314 Mass. 544, 50 NE (2d) 785.

In Re Santosuosso, 318 Mass. 489, 62 NE (2d) 105, 161 ALR 892.

In Re Thatcher v. United States, (8th C.A. 5th Circuit 1914), 212 Fed. 861.

The strict rules of evidence do not apply in a disbarment proceeding although they are frequently invoked to insure a fair hearing. *Werner v. State Bar*, 24 Calif. (2d) 611, 150 P (2d) 892. This exception seems to be based on the theory that a "disbarment" proceeding is much like a proceeding before an administrative agency where the rules of evidence as to hearsay are not strictly enforced. *Louisiana State Bar Association v. Sackett*, 231 La. 655, 92 So (2d) 571; *Armitage v. Bar Rules Committee*, 223 Ark. 465, 266 SW (2d) 818.

Chapter 20, of the Colorado Rules of Civil Procedure, Sec. 254 in applicable part provides:

> "To warrant a finding of misconduct, the charges must be established by substantial, clear, convincing and satisfactory evidence."

In the case of *State v. Gudmundsen*, 145 Neb. 324, 16 NW (2d) 474, the court at page 476 said:

> "It is therefore the holding of this court that the the finding in a civil action that an attorney at law has been guilty of conduct justifying disbarment is not conclusive on the same question when presented for determination in an action for disbarment; that notwithstanding the finding in the civil action the

culpability of the attorney must be established in the disbarment action by a clear preponderance of the evidence. For this purpose the evidence taken at the trial of the civil action and all other competent evidence is admissible."

In the present case the records and transcripts were not taken by the Committee as conclusive of petitioner's misconduct, but on the contrary the Committee received the records and transcripts of the civil cases only as evidence of his misconduct and gave petitioner the opportunity of presenting all other competent evidence to rebut, overcome and impeach the contents of these records.

In the case of *Werner v. State Bar*, 24 Calif. (2d) 611, 150 P (2d) 892, the court said:

"There is no legislative requirement, therefore, that the rules of evidence in the code of civil procedure be applied in disbarment proceedings, although they are frequently invoked to insure a fair hearing. There is no reason for invoking them, however, if they are not necessary to serve that purpose. (Page 893)

"Hearsay evidence is often excluded to insure that all evidence may be tested by cross-examination. . . . On three successive trials petitioner had the oportunity to cross-examine the witnesses against him and the record shows that he fully exercised the right at the last trial so that there is little likelihood that any significant weakness in the testimony of the witnesses was overlooked. On essentially similar facts, in Re Durant, 80 Conn. 140, 67 A 497, 10 Ann. Cas.

539, and in *In re Lacy*, 234 Mo. App. 71, 112 SW (2d) 594, it was held that the record of a previous trial was admissible in a disbarment proceeding, and it was noted that when the court thus exercises its power to supervise its officers in a proceeding in which a jury has no part, there is no need to adhere strictly to rules made primarily to govern jury trials. (Page 894)

"The requirement that parties and subject matter be the same is designed to make certain that the cross-examination in the first proceeding can serve as well in the second. . . . Since this purpose is fulfilled, the transcript was properly admitted. Moreover, petitioner was free to introduce additional evidence in his own behalf but did not avail himself of this right." (Page 894)

In the present case petitioner availed himself of this right consuming over two days in the presentation of his case. Petitioner was personally present in both civil actions and had full opportunity to cross-examine and did cross-examine all witnesses either personally or through counsel and the cross-examination in the civil proceedings served as well in the present proceeding.

In objecting to the admission into evidence of these records, petitioner fails to draw the distinction existing between the case at bar and the ordinary civil or criminal proceeding. In the case of *In Re Lacy*, 239 Mo. App. 71, 112 SW (2d) 594, at Page 601, the court drew this distinction saying:

"In his brief and argument, the respondent has

proceeded on the theory that this is an adversary proceeding. We do not so understand it. It is an investigation by the court into the conduct of one of its officers and is neither a civil action nor a criminal proceeding, but a proceeding sui generis, the object of which is not to punish the offender, but to protect the court."

At Page 604 in the same case the court continues as follows:

"The admission to the Bar and a license to practice his profession does not confer upon one any vested right to continue in such practice. * * * The inquiry should not be limited or circumscribed by the strict rules of evidence.

"In this proceeding the informants are investigating and making an inquiry into the conduct of respondent in a former trial. In his testimony in that trial, Keeton described the conduct of respondent. He was properly cross-examined and we think that his testimony is admissible in this inquiry."

Again, in the case of *In Re Wilson*, 76 Ariz. 49, 258 P (2d) 433, the court draws this distinction at Page 435 as follows:

"Were this a proceeding in a criminal action, or a suit between parties in a civil matter, the objections as to foundation and identification would raise a serious question. However, the right to practice law is not an inherent right but a peculiar privilege granted and continued only to those who demonstrate special

tness as intellectual attainment and in moral character. Just as only those who pass the tests can enter the profession, only those who maintain the standards are allowed to remain in it."

And at Page 436 said:

"These cogent principals cannot be defeated by the strict rules of evidence. The integrity of the courts and the safety of the public override such a view."

In the case of *In Re Durant*, 80 Conn. 140, 67 A. 497, at Page 501 of the Atlantic reports the court discussed this subject as follows:

"The action of the court in the exercise of this power (disbarment) is judicial in its character, but the inquiry made is 'in the nature of an investigation by the court into the conduct of one of its own officers, not the trial of an action or suit,' and the order entered is but an exercise of the disciplinary jurisdiction which it has over such officers. * * * The real question for determination in such proceedings is whether or not the attorney is a fit person to be longer allowed the privileges of being an attorney.

"In its determination, therefore, naturally and necessarily enters a large measure of judicial discretion. This discretion, however, is not an absolute one so that an attorney may be removed from the bar without notice of the charges against him and an opportunity to be heard. * * * The attorney is, in other words, entitled to a fair hearing or opportunity to be heard and a fair determination of the question at issue, in the exercise of a sound judicial discretion.

> "* * * In the absence of prescribed regulations the manner of the proceeding, so that it be without oppression or injustice, is for the court itself."

In objecting to the admissibility of these records petitioner also ignores the uniqueness of the privilege of practicing law and the inherent power of the court to deny or take away the privilege for just cause. In the case of *In Re Durant*, supra, at Page 300 of the Atlantic report the court said:

> "An attorney at law is an officer of court, exercising a privilege or franchise to the enjoyment of which he has been admitted not as a matter of right, but upon proof of fitness, through evidence of his possession of satisfactory legal attainments and fair private character. * * * For the manner in which this privilege or franchise is exercised he is continually accountable to the court, and it may at any time be declared forfeited for such misconduct, whether professional or non-professional, as shows him to be an unfit or unsafe person to manage the business of others in the capacity of an attorney. * * * The power to declare this forfeiture is a summary one inherent in the courts, and exists, not to mete out punishment to an offender, but that the administration of justice may be safeguarded and the courts and the public protected from the misconduct or unfitness of those who are licensed to perform the important functions of the legal profession."

In the case of *In Re Keenan*, 314 Mass. 544, 50 NE (2d) 785, the court in deciding a similar question as to the admissibility into evidence of records of another

case at Page 780 discussed the privilege of practicing law as follows:

> "The right to practice law is not one of the inherent rights of every citizen, as is the right to carry on an ordinary trade or business. It is a peculiar privilege granted and continued only to those who demonstrate special fitness in intellectual attainment and in moral character. All may aspire to it on an absolutely equal basis, but not all will attain it. Elaborate machinery has been set up to test applicants by standards fair to all and to separate the fit from the unfit. Only those who pass the test are allowed to enter the profession, and only those who maintain the standards are allowed to remain in it." All of this is familiar enough. It is adverted to here only for the purpose of emphasizing at the outset that in deciding a case of this kind considerations of public welfare are wholly dominant."

In the case of *In Re Santosuosso*, 318 Mass. 489, 62 NE(2d) 105, 161 ALR 892, the court quoted the above language from *In Re Keenan*, supra, and then said:

> "These paramount considerations cannot be defeated by the application to such proceedings as the present one of the strict rules of evidence governing the trial of adversary proceedings between parties. The necessity for the preservation of the integrity of the courts and the safety of the public rises above the strictly technical rules of evidence that govern such adversary proceedings between parties. We are of the opinion that the evidence contained in the record offered by counsel designated by the court to conduct

> the proceeding, that is, the evidence adduced at the hearing in the Superior Court of the equity suit in question, at which the respondent, a party thereto, was present and represented by counsel, testified and had full opportunity to present and examine witnesses and to cross-examine those called by the plaintiff, is admissible in the present inquiry." (Page 107)

The last quoted case is directly in point with the case at bar in that the only evidence introduced against the respondent in the cited case was the record of a civil case in equity. The petitioner in the case at bar as in the cited case was a party to the civil actions, was personally present in both cases, was represented by counsel in one, testified, had full opportunity to and did present and examine witnesses and had full opportunity to, and did personally, or by his counsel, cross-examine witnesses called by the plaintiffs.

A great part of the record in each civil case consists of the testimony of petitioner himself. The records were brought to the Colorado Supreme Court by petitioner for review and he thus vouched for their authenticity. The conduct for which he was tried before the Grievance Committee was the same conduct for which he was tried in the District Court upon the complaints of the plaintiffs in those cases. The judgments rendered in those cases were reviewed and affirmed by the Colorado Supreme Court as a result of a writ of error sued out by petitioner.

CONCLUSION

1. This Court should not assume jurisdiction over this case.

2. Petitioner had notice of the charges against him, had an opportunity to be heard, and was heard in his defense.

3. The records of the two previous civil actions were admissible.

4. The petitioner was not deprived of any rights guaranteed by the United States Constitution or the Constitution of the State of Colorado.

5. The petition for writ of certiorari should be denied.

Respectively submitted,

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